

GARY K. NELSON, THE ATTORNEY GENERAL  
STATE CAPITOL  
PHOENIX, ARIZONA

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August 14, 1970

DEPARTMENT OF LAW LETTER OPINION NO. 70-8-L (R-94)

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REQUESTED BY: BRUCE PARKINSON  
Secretary  
Employment Security Commission

- QUESTIONS:
1. What is the effective date of the changes in compensation of the members of the Employment Security Commission, the members of the Advisory Council and the members of the Appeal Tribunal, as provided in Arizona Session Laws, 1970, Chapter 204?
  2. Who is authorized to fix the compensation of the members of the Employment Security Commission, the members of the Advisory Council and the members of the Appeal Tribunal under Arizona Session Laws, 1970, Chapter 204?
  3. Are the members of the Employment Security Commission, the members of the Advisory Council and the members of the Appeal Tribunal entitled to travel expenses and subsistence after the effective date of Arizona Session Laws, 1970, Chapter 204?

- ANSWERS:
1. See body of opinion.
  2. The Employment Security Commission.
  3. Yes.

I

EMPLOYMENT SECURITY COMMISSION

Prior to the enactment of Arizona Session Laws, 1970, Chapter 204, A.R.S. § 23-641.A provided:

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A. The employment security commission of this state shall be composed of three members. The members of the commission shall be appointed by the governor and shall hold office coterminously with the term of the governor. The commissioners shall be paid from the employment security administration fund created by § 23-707. The chairman shall be paid a fixed monthly salary of two hundred fifty dollars per month, and each of the other two commissioners shall be paid a fixed monthly salary of two hundred dollars per month. In addition each commissioner shall be paid mileage and expenses as may be allowed by law in traveling from his regular place of residence to meetings of the commission, or as otherwise required in the discharge of his duties.

A.R.S. § 23-641.A., as amended by Arizona Session Laws, 1970, Chapter 204, § 54, provides:

A. The employment security commission of this state shall be composed of three members. The members of the commission shall be appointed by the governor and shall hold office coterminously with the term of the governor. The commissioners shall be paid from the employment security administrative fund created by section 23-707. The chairman and each of the other two commissioners shall receive compensation as determined pursuant to section 38-611.

The paragraph of A.R.S. § 38-611 applicable to the Commission provides:

D. Except as otherwise provided by statute or specific legislative appropriation members of boards, commissions, councils or advisory committees who are authorized by law to receive compensation may receive compensation at the rate of not to exceed thirty dollars for each day engaged in the service of such board, commission, council or advisory committee.

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The date upon which Arizona Session Laws, 1970, Chapter 204 became operative is August 11, 1970, being ninety days after the close of the session of the Legislature during which said chapter was enacted.

We said in Department of Law Letter Opinion No. 62-66-L (R-261), June 15, 1962, that changes in compensation of members of the Employment Security Commission are subject to the restrictions contained in Arizona Constitution, Article 4, part 2, § 17, which provides:

The Legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer, other than a justice of the peace, be increased or diminished during his term of office; provided, however, that when any legislative increase or decrease in compensation of the members of any court or the clerk thereof, or of any board or commission composed of two or more officers or persons whose respective terms of office are not coterminous, has heretofore or shall hereafter become effective as to any member or clerk of such court, or any member of such board or commission, it shall be effective from such date as to each thereof.

We said in Department of Law Opinion No. 70-21 (R-93), July 29, 1970, that a change in compensation of a state officer appointed to a fixed and definite term not at the pleasure of the appointing authority is not prohibited by Arizona Constitution, Article 4, part 2, § 17, when the change is intended to maintain the purchasing power of the officer's initial compensation.

When we compare the present compensation of members of the Employment Security Commission with that provided under A.R.S. § 38-611.D, we are unable to conclude that the change

in compensation is intended to maintain the purchasing power of the present compensation of the members of the Employment Security Commission.

It is our opinion, therefore, that the change in compensation provided in A.R.S. § 38-611.D for members of the Employment Security Commission does not become operative until the end of the terms of office of the present members of the Employment Security Commission. The terms of office of the members of the Employment Security Commission are coterminous with that of the Governor. The next term of office of the Governor will begin on the first Monday of January next after his election (Arizona Constitution, Article 5, § 1), which will be January 4, 1971. Therefore, the change in compensation of members of the Employment Security Commission will become operative on January 4, 1971.

#### ADVISORY COUNCIL

Prior to the enactment of Arizona Session Laws, 1970, Chapter 204, A.R.S. § 23-646 provided:

A. The commission shall appoint, without regard to § 23-650, a state advisory council not to exceed nine members, composed of men and women, including an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment or affiliations, and including not more than three members representing the general public as the commission may designate.

B. The advisory council shall aid the commission in formulating policies and discussing problems related to the administration of this chapter, and in assuring impartiality and freedom from political influence in the solution of such problems.

C. Each member of the advisory council shall be compensated in the amount of twenty dollars for each day in attendance upon a meeting of

the council in addition to reimbursement for any necessary expenses, but compensation paid to any one member of the council shall not exceed the sum of three hundred dollars in any one fiscal year.

D. The commission may also appoint, without regard to § 23-650, special councils to perform appropriate services, the members of which shall serve without compensation but who shall be reimbursed for necessary expenses.

A.R.S. § 23-646, as amended by Arizona Session Laws, 1970, Chapter 204, § 55, provides:

A. The commission shall appoint, without regard to section 23-650, a state advisory council not to exceed nine members, composed of men and women, including an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment or affiliations, and including not more than three members representing the general public as the commission may designate.

B. The advisory council shall aid the commission in formulating policies and discussing problems related to the administration of this chapter, and in assuring impartiality and freedom from political influence in the solution of such problems.

C. Each member of the advisory council shall be compensated as determined pursuant to section 38-611 for each day in attendance upon a meeting of the council, but compensation paid to any one member of the council shall not exceed the sum of three hundred dollars in any one fiscal year.

D. The commission may also appoint, without regard to section 23-650, special councils to perform appropriate services, the members of which shall serve without compensation.

A.R.S. § 38-611.D, supra, is applicable to the Advisory Council. Whether a change may be made in the compensation of members of the Advisory Council on August 11, 1970, or at any time thereafter prior to the end of the term of any member depends upon whether Arizona Constitution, Article 4, Part 2, § 17, is applicable.

The constitutional prohibition against changes in compensation is applicable only to a "public officer".

The chief elements of a public office were enumerated in Winsor v. Hunt, 29 Ariz. 504, 243 P. 407 (1926), in 29 Ariz. at 520, as follows:

. . . The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power. A position which has these three elements is presumably an "office," while one which lacks any of them is a mere "employment." (Original emphasis.)

The only authority vested in the Advisory Council is that it assist the commission in formulating policies and discussing problems related to the performance of the duties of the commission. The Advisory Council lacks authority to formulate that policy or to administer or enforce the provisions of the laws of this state related to employment security.

In State ex rel. Nagle v. Page, 98 Mont. 14, 37 P.2d 575 (1934), the Supreme Court of Montana said, in 37 P.2d at 578:

. . . The mere fact that the law prescribes certain duties to be performed by one occupying a public position is not determinative

of the fact that a portion of the sovereign power has been delegated, as in the case of a public administrator [citation omitted], or of a court reporter [citation omitted.]

The Supreme Court of Pennsylvania in Harrington v. Tate, 435 Pa. 176, 254 A.2d 622 (1969), has indicated that an advisory board whose decisions are merely recommendations which the receiver thereof is free to ignore is not exercising administrative or governmental functions.

It is our opinion that the members of the Advisory Council are not public officers within the meaning of Arizona Constitution, Article 4, part 2, § 17; and, therefore, the change in compensation applicable to them became operative on August 11, 1970.

#### APPEAL TRIBUNAL

Prior to the enactment of Arizona Session Laws, 1970, Chapter 204, A.R.S. § 23-671 provided:

The commission shall establish one or more impartial appeal tribunals to hear and decide disputed claims. Such appeal tribunals shall consist in each case of three members. One of the members shall be a salaried examiner selected in accordance with § 23-650, who shall serve as chairman, one member shall be a representative of employers, and one member shall be a representative of employees. Each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than twenty dollars per day of active service on the tribunal, plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. In no case shall the hearing proceed unless the chairman of the appeal tribunal is present.

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A.R.S. § 23-671, as amended by Arizona Session Laws, 1970, Chapter 204, § 58, provides:

The commission shall establish one or more impartial appeal tribunals to hear and decide disputed claims. Such appeal tribunals shall consist in each case of three members. One of the members shall be a salaried examiner selected in accordance with section 23-650, who shall serve as chairman, one member shall be a representative of employers, and one member shall be a representative of employees. Each of the latter two members shall serve at the pleasure of the commission and shall receive compensation as provided pursuant to section 38-611. No person shall participate on behalf of the commission in any case in which he is an interested party. The commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. In no case shall the hearing proceed unless the chairman of the appeal tribunal is present.

The Arizona Supreme Court in State ex rel. Colorado River Commission of Arizona v. Frohmiller, 46 Ariz. 413, 52 P.2d 483 (1935), held that Arizona Constitution, Article 4, part 2, § 17 applies only to public officers who have fixed terms of office.

Inasmuch as the Chairman of the Appeals Tribunal is a salaried examiner covered by the personnel system applicable to the officers and employees of the Commission and the other members of the tribunal serve at the pleasure of the commission, changes in their compensation are not subject to the Arizona Constitution, Article 4, part 2, § 17.

Therefore, changes in compensation for the two members of the Appeals Tribunal became operative on August 11, 1970.

II

It appears that the compensation of the members of the Employment Security Commission, the members of the Advisory Council and the members of the Appeals Tribunal is paid from the employment security administration fund, which is established and administered pursuant to A.R.S. § 23-707, as follows:

A. There shall be a special fund in the state treasury known as the employment security administration fund.

B. All monies deposited or paid into the employment security administration fund are appropriated and made available to the commission. All monies in the fund except monies withdrawn from the unemployment trust fund under § 903 of the social security act, as amended, for payment of administrative expenses shall be expended solely for the purposes and in the amounts found necessary by the secretary of labor of the United States and the employment security commission for the proper and efficient administration of this chapter.

C. The employment security administration fund shall consist of all monies appropriated by this state and all monies received from the United States or any agency thereof, including the United States department of labor or from any other source for such purpose. Monies received from the railroad retirement board as compensation for services or facilities supplied to the board shall be paid into the fund.

\* \* \*

// We understand that the commission secures, via budgetary submissions, the approval of the Secretary of Labor of the United States of America for the expenditure for personal services, after which the Commission allocates the approved amount as it deems appropriate and as prescribed by law.

It is our opinion, therefore, that the Employment Security Commission is authorized to fix the compensation of the members of the Employment Security Commission, the members of the Advisory Council and the members of the Appeals Tribunal when Arizona Session Laws, 1970, Chapter 204 becomes operative as set forth in Section I above.

III

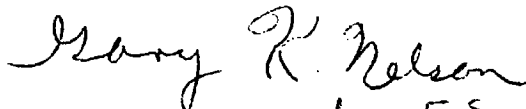
Arizona Revised Statutes, Title 38, Chapter 4, Article 2, entitled "Travel Expenses", provides generally the eligibility and amounts for travel and subsistence.

A.R.S. § 38-621.A provides:

A. The provisions of this article shall apply to every public officer, deputy or employee of the state, or of any department, institution or agency thereof, and to a member of any board, commission or other agency of the state when traveling on necessary public business away from his designated post of duty and when issued a proper travel order.

In the absence of specific legislation prohibiting the payment of travel expenses and subsistence to the members of the Employment Security Commission, Advisory Council and the Appeals Tribunal, it is our opinion that they may be paid for travel expenses and subsistence when appropriate.

Respectfully submitted,

  
GARY K. NELSON  
Atty. Gen.

GARY K. NELSON  
The Attorney General